Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 84-1235 (2)

IN THE
Supreme Court of the United States
October Term, 1984

JOHN W. WATERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

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January 1985

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN WALTER WATERMAN,
Defendant.

CR. 81-0-47

FILED
District of Nebraska
At _____M
AUG 17 1983
William L. Olson
Clerk
By _____ Deputy

John W. Waterman was convicted by a jury on five counts of an indictment charging him with devising and intending to devise a scheme and artifice to defraud by use of the mails, in violation of 18 U.S.C. §§ 1341 and 1342. The mail fraud charges arose out of Waterman's participation in, and connection with, an arson-for-profit scheme in Omaha, Nebraska. On June 17, 1982, Waterman was sentenced to a two-year term of imprisonment on each count. The Court ordered Waterman to serve these five sentences of imprisonment consecutively. On appeal, the Eighth Circuit Court of Appeals affirmed Waterman's convictions on four counts and reversed the fifth count for lack of substantial evidence to support that conviction. Waterman's petition for rehearing with a further request for hearing *en banc* was thereafter denied by the Court of Appeals.

On July 27, 1983, Waterman filed a properly-pleaded motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. On August 11, 1983, a hearing, at which both Waterman and the United States were represented by

counsel, was held with respect to Waterman's § 2255 motion. After careful review and consideration of the pleadings, exhibits, briefs, and arguments and stipulations of counsel, the Court concludes that Waterman's motion for postconviction relief should be denied.

Waterman now challenges the propriety, legality and constitutionality of an agreement entered into by and between the United States and Eugene Gamst, the leader of the arson ring at issue and the government's chief witness against Waterman. After Gamst's conviction and incarceration, he agreed to collaborate with the government in order to provide a basis for charging additional participants in the arson scheme. The substance of the agreement was that, if Gamst's cooperation in the form of truthful testimony led to further indictments, then the government would (1) affirmatively recommend that Gamst's sentence be reduced by two years, and (2) inform appropriate federal agencies of the fact and extent of Gamst's cooperation. If, however, Gamst's testimony did not lead to the indictment of other individuals, then the government would acknowledge and inform the Court of other individuals, then the government would acknowledge and inform the Court of Gamst's cooperation, but would not specifically recommend any reduction in his sentence. The record reveals that as a result of Gamst's testimony at the grand jury investigation and trial of Waterman, the government in fact made an affirmative recommendation that Gamst's sentence of imprisonment be reduced by two years.

In support of his § 2255 motion, Waterman argues that the agreement between the United States and Gamst in particular, as well as similar bargains in general: (1) deprived Waterman of his Sixth Amendment right to a

fundamentally fair trial; (2) deprived Waterman of due process of law and equal protection under law, in violation of the Fifth Amendment to the Constitution; (3) violated the spirit if not the letter of 18 U.S.C. § 201 (criminal statute proscribing bribery of public officials and witnesses); (4) encouraged the giving of false and perjured testimony against which a defendant's right to cross-examine witnesses is an insufficient safeguard; and (5) constituted bounty agreements which trade favors for indictments and undermine the integrity of our judicial system. The Court disagrees.

This Court has been cited to no decisional authority which struck down or invalidated on constitutional grounds an agreement such as that entered into by the government and witness Gamst. It may be noted that an agreement not to prosecute, or to recommend leniency in the punishment of, an accomplice "who is cooperating in the conviction of others is recognized as a proper exercise of authority." *United States v. Librach,* 536 F.2d 1228, 1230 (8th Cir.), *cert. denied,* 429 U.S. 939 (1976); *see also United States v. Vida,* 370 F.2d 759, 767 (6th Cir. 1966) (use of the testimony of a convicted but unsentenced accomplice does not deprive one who stands trial of due process or fair treatment).

Waterman's protestation to the contrary notwithstanding, the credibility of Gamst and the sufficiency of evidence against Waterman in the absence of Gamst's testimony must be considered in disposing of the instant § 2255 motion. In that connection, the Court notes as follows:

1) The agreement made to secure the truthful testimony of Gamst in the criminal proceeding against Waterman was read in open court and admitted in evidence. "[T]he

jury was fully apprised of the conditions under which [Gamst] testified." *Librach, supra.*

2) During the trial of Waterman, Gamst was subjected to thorough and exhaustive cross-examination about the nature of his arrangement with the government.

3) The possibility of a recommendation of reduction of Gamst's sentence was not discussed until after Gamst had come forward with information about other participants in the arson scheme, and had indicated his willingness to testify. *See United States v. James,* 494 F.2d 1007, 1013 n.3 (D.C.Cir.), *cert. denied,* 419 U.S. 1020 (1974).

4) Even if Gamst's testimony was totally discounted, there was substantial evidence, both testimonial and documentary, from which the jury could have reached the same verdicts. *See Hallman v. United States,* 490 F.2d 1088, 1090 (8th Cir. 1973). At trial, several witnesses, including Peggy O'Brien, Phillip Dahl and Delores Skelton, provided damaging testimony against Waterman. As stated by the Court of Appeals, ". . . the Government presented additional witnesses whose testimony corroborated that of Gamst and independently confirmed Waterman's role in arranging the arson fires charged in counts I through IV." *United States v. Waterman,* 704 F.2d 1014, 1017 (8th Cir. 1983).

Finally, Waterman has wholly failed to show "that the challenged government conduct violates 'that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment.'" *United States v. Brown,* 635 F.2d 1207, 1212 (6th Cir. 1980), *quoting United States v. Russell,* 411 U.S. 423, 432 (1973).

For each and all of the foregoing reasons,

IT IS HERBY ORDERED that Waterman's motion (Filing No. 85) for postconviction relief under 28 U.S.C. § 2255 should be and the same is hereby denied.

IT IS FURTHER ORDERED that the stay of the order of commitment (Filing No. 84) heretofore entered is dissolved and defendant shall report to the Office of the United States Marshal, Room 8121, United States Post Office and Courthouse, 215 North 17th Street, Omaha, Nebraska, 68102, on the 24th day of August, 1983, at 9 a.m., to commence serving his sentences on Counts I through IV, previously imposed.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT

I certify this to be a true copy of the original record in my custory.
WILLIAM L. OLSON, CLERK

By /s/